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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1113

NORMAND SMITH and NANCY L. SMITH, and HARRY NEUMANN,

Petitioners,

v.

GOVERNMENT OF THE VIRGIN ISLANDS, HARVEY ALUMINUM (INCORPORATED), and HARVEY ALUMINA, VIRGIN ISLANDS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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GOVERNMENT OF THE VIRGIN ISLANDS, HARVEY ALUMINUM (INCORPORATED), and HARVEY ALUMINA, VIRGIN ISLANDS, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Normand Smith, Nancy Smith and Harry Neumann, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on February 28, 1964, and amended on April 10, 1964.

Citations to Opinions Below

The opinion of the District Court of the Virgin Islands is unreported at this time and is printed in the Appendix hereto, page A-23, and in Appellants Appendix submitted herewith, page 71a. The opinion of the Court of Appeals, printed in Appendix hereto, pages A-3-A-23, is reported in 329 F. 2d 135, 4 V. I. ——.

Jurisdiction

The judgment of the Court of Appeals was entered on February 28, 1964 and was amended as to costs awarded on April 10, 1964. Timely petition for rehearing was denied on April 10, 1964. The jurisdiction of this Court is invoked under Title 28 U. S. C. 1254 (1).

Questions Presented

1. Whether expenditure of public moneys for private use, purpose and profit offends the Equal Protection and Due Process clauses of the Bill of Rights granted the Virgin Islands by Act of Congress.

2. Whether the gratuitous grant of public lands to a private corporation for private use offends the Equal Protection clause of the Bill of Rights granted the Virgin Islands.

3. Whether an act of the Territorial Legislature, gratuitously granting public lands to, and authorizing expenditure of public moneys for the benefit of, a private corporation, together with exceptional tax exemptions, subsidies and benefits not granted others, is a special law prohibited by federal statute, 24 Stat. 170.

4. Whether construction and operation of an Alumina plant by a private interest, for private profit, with anticipated incidental benefits to citizens, is for a "public purpose", as defined by this Court.

Statutes Involved

The statutory provisions involved are Section 3 of the Revised Organic Act of the Virgin Islands, 68 Stat. 498, amended, 72 Stat. 1094, Title 48 U. S. C. 1561; and General

Territorial Provisions, Local or Special Laws, 24 Stat. 170, Title 48 U. S. C. 1471. These are printed verbatim in the Appendix, pages A-28-A-31.

The pertinent portion of the Revised Organic Act provides:

> "No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws."

The pertinent portion of 24 Stat. 170 provides:

> "The legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say:
>
> "• • •
>
> "Granting to any corporation, association or individual any special or exclusive privileges, immunity, or franchise whatever."

Statement

Jurisdiction of the District Court of the Virgin Islands was invoked because the cause of action arose within that jurisdiction.

Act No. 814 (Appendix 22a),* ratifying and adopting an agreement between the Government of the Virgin Islands and Harvey Alumina Virgin Islands, Inc., was passed by the Virgin Islands Legislature February 19 and approved by the Governor February 20, 1962.

The agreement, section 1, (Appendix 25a) provides for conveyance by the Government of about 1200 acres of

* When page number is followed by letter "a" reference is to Appellants' Appendix below.

public land to Harvey interests. (Conveyance was made in May, 1962). Section 8 grants the right, but does not obligate Harvey, to sell power and water. Notwithstanding such sales, power and water facilities "shall be deemed not to be devoted to public uses or subject the charges therefore to regulation under Title 30 of the Virgin Islands Code." (Statutory regulation of public utilities). Section 9 grants special tax exemptions and subsidies exceeding those granted qualified applicants under the general Industrial Incentive Program act.

Annex C to the agreement (Appendix 54a) provides that the Government will reimburse Harvey to the extent of $3,000,000 the cost of dredging a channel and turning area to provide access from the sea to Harvey's plant. It was also agreed that 25 acres with access to the basin would be reconveyed to the Government for industrial development. The Government also agreed to maintain the channel and turning area and keep it free from obstructions and dredged to completed dimensions. Harvey is granted the right to use the channel and turning area free of any taxes, excises, duties, fees, charges, imports, or exactions for a period of sixteen years from the first commercial use.

On its part, Harvey agreed, section 4, to commence preparations for the construction of an alumina plant of not less than 100,000 short tons annual capacity. It also agreed, section 6, that during the tax exempt period not less than 75% of Harvey's employees would be legal residents of the Virgin Islands, unless sufficient qualified personnel are unavailable, competence to be determined by Harvey.

Section 12 provides that Harvey may terminate the agreement at any time upon thirty days notice. The Gov-

ernment may terminate only in the event the initial phase of construction shall not have been completed within five years.

On December 12, 1962, petitioners, as taxpayers, filed their suits in the District Court of the Virgin Islands to enjoin expenditure of public funds required by the agreement, and cancellation of the deeds of conveyance.

The Smith complaint against the Government, in which the other respondents intervened, (Appendix 1a) challenges the Government's right to expend public moneys to reimburse Harvey the cost of dredging a channel and turning basin to provide access to its plant, and in maintaining the channel.

The Neumann complaint against the respondents herein (Appendix 6a) challenges the Government's right to give 1200 acres of public land to Harvey as an inducement to install and operate an alumina plant on St. Croix.

On February 9, 1963 respondents and interveners filed motions to dismiss, under (Rule 12(b); (Appendix 12a-16a) supported by affidavits, Exhibits 1-8, upon the grounds that the petitioners, as taxpayers, had not contributed and would not contribute directly to funds from which payments would be made and with which the lands were acquired, and, therefore, lacked standing to sue. Each of the motions also contained a motion for summary judgment, under rule 56(b), supported by the same affidavits. The affidavits, Exhibits 1-8, generally go to the question of petitioners' standing as taxpayers to maintain the action. They are recited in respondents' appendix below, pages 1b-17b. The cases were consolidated in the District Court and in the Court below.

The District Court, by order of July 10, 1963, granted the motions to dismiss with costs and attorney's fees,

upon the ground that the petitioners, as taxpayers, lacked standing to sue, citing authority of *Massachusetts v. Mellon*, 262 U. S. 447, *Doremus v. Board of Education*, 342 U. S. 429, and *Ottley v. Government of the Virgin Islands*, 161 Fed. Supp. 210, 3 V. I. 292. The Court also stated that, absent ruling on the motion to dismiss, it would have granted the motion for summary judgment on authority of *Ferguson v. Skrupa*, 372 U. S. 726.

The Court below vacated the Order dismissing the petitions and remanded the cause with directions to the District Court to enter summary judgments against petitioners. In so doing, the Court held that, since matters outside the pleadings were presented to and not excluded by the court, the court was procedurally precluded from dismissing the petitions by Rules 12(b) and (c) and compelled to proceed under Rule 56 pertaining to summary judgment.

In determining that summary judgment should be entered, the court confined the issues to whether or not the legislation "serves" a public purpose, holding that legislative declaration thereon is "well-nigh conclusive," and that here the legislative record provided a rational basis for the enactment.

Reasons for Granting the Writ

1. In its order of dismissal the District Court stated:

> "The issues presented by these consolidated cases have weighed heavily on this Court because of their far-reaching import and concern to the Virgin Islands."

The effect of the opinion below is of grave importance and concern to the people of the Virgin Islands. If permitted to stand, it can and probably will be interpreted

as a license to the government to dissipate public land and treasure for the benefit of favored individuals under guise of public purpose so declared by legislative fiat.*

It amounts to a subtle erosion of a right to equal treatment under law secured to the people of the Virgin Islands by their charter.

2. Summary disposition by the court below, by technical interpretation and application of a rule upon a matter which was not contemplated or urged by the parties, deprives the citizens whom petitioners represent of any opportunity to be heard upon the determinative issue. (Petition for rehearing pp. 7-8). Such action constitutes a departure from the accepted and usual course of judicial proceedings warranting review by certiorari.

The issue upon which petitioners sought review below was whether they, as taxpayers, had standing to maintain their suits against the government. This issue was resolved in favor of the taxpayer in an opinion rendered the same day by the court below in *David Smith v. Government of the Virgin Islands*, 329 F. 2d 131.

The questions which are submitted here were argued and discussed below to demonstrate the importance of the taxpayer's right to seek to restrain illegal government action as well as to counter the statement of the District Court regarding summary judgment.

It is and has been contended throughout these proceedings that gifts of public land and money to Harvey, as

* Legislative power of the Virgin Islands is vested in a unicameral legislature composed of eleven senators. The legislative districts of St. Thomas and St. Croix each elect two senators, that of St. John elects one. The other six are elected at large. (Revised Organic Act, Sec. 5). Executive power is vested in a Governor appointed by the President, by and with advice and consent of the Senate. (Revised Organic Act, Sec. 11).

an inducement to locate an industrial plant on St. Croix, is illegal. If the government has a legal right to make such gifts to a favored individual, then it is conceded that the court below was correct in holding that courts should not question the wisdom of the exercise of such right.

3. The opinion does not appear to determine whether the governmental grant was or was not legal, but if the opinion means that it was, then it would appear to be in conflict with principles of law established by this Court in *Citizens Savings and Loan Association* v. *Topeka*, 20 Wall. 655, and *Cole* v. *La Grange*, 113 U. S. 1, and with principles enunciated in *Dodge* v. *Mission Township*, (CCA 8) 107 Fed. 827, 54 L.R.A. 242, and *Sutherland-Innes Co.* v. *Evart* (CCA 6) 86 Fed. 597, which hold that financial aid by taxation or pledges of public credit as an inducement to private manufacturers is for a private rather than public purpose.

4. If the opinion means, as it appears to, that the courts should not question whether an act is for a private or public purpose when it has been declared to be for a public purpose by the legislature, then the opinion would appear to be in conflict with the principle stated in *Dodge* v. *Mission Township*, supra, that "a legislature cannot make a private purpose a public one by its mere fiat."

5. It would appear that the court below, as well as the District Court, misconstrued the import and intent of *Ferguson* v. *Skrupa*, 372 U. S. 726, in consideration and determination of the case at bar. The court was not called upon to sit as a super-legislative body to determine the wisdom of the Act. It was asked to determine whether

petitioners and other citizens were deprived of the right of equal protection of law by the gratuitous grant of land and treasure to a favored corporation. It is not believed that this Court intended in the *Ferguson* case to imply that legislation which impairs real and established constitutional guarantees should not be declared invalid, yet this seems to have been the interpretation of the court below.

6. If the opinion means, as it appears that it does, that courts should not question legislation which is discriminatory, where the public purpose has been declared by the enactment, it would appear to be in conflict with the principal stated by this Court in *Baker* v. *Carr*, 369 U. S. 186, where it was said:

> "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."

7. The opinion below is silent as to whether or not the challenged legislation is a special law proscribed by 24 Stat. 170.

There can be little, if any, doubt that Act No. 814 is a special law, granting special and exclusive privileges and immunities to a corporation; that the prohibitions of the federal statute apply to the legislature of the Virgin Islands, and that the Act was passed in violation of such prohibitions.

This question, while raised for the first time in the Court of Appeals was entertained by that court. It was

thoroughly briefed and argued and the Court granted additional time for submission of briefs on the question. (Petition for rehearing pp. 3-4).

In remanding the cause with instructions to the District Court to enter summary judgment against petitioners, in spite of the apparent violation of the federal statute, and without giving the parties reasonable opportunity, as required by Rule 12 (b), to "present all material made pertinent to" a motion for summary judgment which, in this case, would have been a suggestion of the federal statute, it would appear that the court below so far departed from the accepted and usual course of judicial proceedings as to warrant exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

WARREN H. YOUNG
JOHN D. MARSH
Counsel for petitioner.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,535

NORMAND SMITH and NANCY L. SMITH,
Appellants,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS

and

HARVEY ALUMINUM (Incorporated) and
HARVEY ALUMINA VIRGIN ISLANDS, INC.,
Intervenors,

(Civil Action No. 105-1962)

No. 14,536

HARRY NEUMANN,
Appellant,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS,
HARVEY ALUMINA VIRGIN ISLANDS, INC.
and HARVEY ALUMINUM (Incorporated)

(Civil Action No. 106-1962)

Appeals from the District Court of the Virgin Islands,
Division of St. Croix, Christiansted Jurisdiction.

Present: KALODNER, STALEY and SMITH, Circuit Judges.

These causes came on to be heard on the records from the District Court of the Virgin Islands, Division of St.

Croix, Christiansted Jurisdiction, and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed July 10, 1963, dismissing the plaintiffs' suits be, and the same is hereby vacated, and the causes are remanded with directions to the District Court to enter summary judgments against the plaintiffs; with costs in this Court; and with costs, including reasonable attorneys' fees, as allowed by the District Court.

Attest:

IDA O. CRESKOFF
Clerk

April 10, 1964

Opinion

NORMAND SMITH and NANCY L. SMITH,
Appellants,
v.
GOVERNMENT OF THE VIRGIN ISLANDS,
and
HARVEY ALUMINUM (Incorporated) and
HARVEY ALUMINA VIRGIN ISLANDS, INC.,
Interveners.

HARRY NEUMANN,
Appellant,
v.
GOVERNMENT OF THE VIRGIN ISLANDS,
HARVEY ALUMINA VIRGIN ISLANDS, INC.
and HARVEY ALUMINUM (Incorporated).

Nos. 14535, 14536.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT.

Argued Oct. 11, 1963.*
Decided Feb. 28, 1964.
Rehearing Denied April 10, 1964.

Before: KALODNER, STALEY and SMITH, Circuit Judges.

KALODNER, Circuit Judge.

These appeals are from an Order of the District Court dismissing, for failure to state a claim upon which relief can be granted, two consolidated separate taxpayer suits brought by the appellants to enjoin the performance by the Government of the Virgin Islands ("Government") of

* The appeal was submitted for disposition on November 19, 1963 when the last of the parties' briefs was filed.

an Agreement, ratified and adopted by Act 814[1] of the Legislature of the Virgin Islands, with Harvey Alumina Virgin Islands, Inc. ("Harvey")[2] relating to the development by Harvey, on the Island of St. Croix, of a $25,000,000 alumina[3] plant, including a deep-water access channel and turnabout area.

The pertinent provisions of the Agreement may be highlighted as follows: Government was (1) to convey to Harvey as site for the alumina plant, subject to the approval of the Federal Aviation Agency of the United States, some 700 acres known as Airport Land, as to which it held a restricted title,[4] and such title as it had in a 500-acre salt water marshland described as Krause Lagoon;[5] (2) to grant Harvey certain tax exemptions and subsidies

1. Act 814 was enacted by the Virgin Islands Legislature on February 19, 1962 and approved by the Governor of the Virgin Islands on February 20, 1962.

2. Harvey Alumina Virgin Islands, Inc., a Virgin Islands Corporation, is a wholly-owned subsidiary of Harvey Aluminum (Incorporated), a California corporation.

3. Alumina, a white odorless powder refined from bauxite ore, is the base material from which aluminum is derived.

4. The United States made a gift of a restricted title to Airport Land to the Municipality of St. Croix on November 22, 1948, pursuant to the Surplus Property Act of 1944, 58 Stat. 765, as amended 61 Stat. 678-679, 50 App. U.S.C.A. § 1622(g) (2) (A); title of the Municipality of St. Croix was later vested in the Government of the Virgin Islands by the Revised Organic Act of the Virgin Islands, 68 Stat. 497, 502-503, 48 U.S.C.A. § 1576.

Under the Surplus Property Act of 1944 Government could not convey its restricted title to Airport Land without the approval of the United States. On May 16, 1962, the Federal Aviation Agency approved the conveyance of Airport Land to Harvey subject to an easement not here relevant.

5. The record establishes that title to the Krause Lagoon tract was acquired by Government from one H. Bingham Hark in January, 1963—subsequent to the execution of the Agreement—on payment of $6,100 by Harvey to Hark.

for a 16-year period;" (3) to "use its best efforts" to enable Harvey to obtain reimbursement of no more than $3,000,000 of Harvey's cost, in developing the deep-water channel and its turnabout area from certain so-called

6. The Agreement contained these provisions with respect to tax exemptions and subsidies accorded to Harvey by Government:

"9. Tax exemptions and Subsidies.

"(A) Harvey and such of its Affiliates as are engaged in constructing, owning and/or operating, in whole or in part, the Plant and Related Facilities shall for a period of sixteen (16) years from the Approval Date be exempt from payment of all taxes, excises, duties, imposts and exactions imposed by or with the consent of the Government, or any subdivision, agency or instrumentality thereof, on construction, ownership, operation, maintenance, expansion or other activity in respect of the Plant and Related Facilities and the raw materials, work in process and products thereof (including importing, exporting, loading, unloading, processing, production and sale of bauxite, alumina, any compound or combination of either of them, or any other raw material or product of, or any equipment or machinery imported for use at, the Plant and Related Facilities). The foregoing exemption shall include specifically exemption from:

"(i) all property and franchise taxes;

"(ii) all annual or specific license fees (except automobile license fees);

"(iii) all import duties and other taxes, including trade taxes and excise taxes, on building materials, furnishings and equipment used in the construction, operation, maintenance and expansion of the Plant and Related Facilities, and on raw material brought into the Virgin Islands for consumption or processing at the Plant and Related Facilities;

"(iv) all excise and gross receipts taxes in respect of exports or sales of products or hire or use of property.

* * * * *

"Contractors and subcontractors for Harvey and its Affiliates shall be exempt from the payment of all excise taxes on building materials, furnishings and equipment imported into the Virgin Islands by such contractors and subcontractors for use in the construction and expansion of the Plant and Related Facilities during the period to which the foregoing exemption applies; provided, however, that the exemption provided for in this sentence shall not

matching funds payable by the United States to Government with the proviso that if allocations from the matching funds proved insufficient that Harvey could secure reimbursement from Government's "unobligated non-tax revenues", and if the latter were insufficient, Harvey could "offset" unpaid balances against its obligation to pay

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be applicable to construction equipment of such contractors and subcontractors.

"(B) Harvey and such of its affiliates as are engaged in the business of constructing, owning and/or operating, in whole or in part, the Plant and Related Facilities shall, except to the extent that Federal statute may otherwise provide, receive a non-taxable subsidy measured by the following taxes, except to the extent that Harvey and its Affiliates are exempted from such taxes pursuant to the terms of this Agreement, in an amount equal to

"(i) seventy-five percent (75%) of the income taxes in respect of a period of sixteen (16) years from the date of completion of construction of the Plant (other than in respect of income derived from sources within any of the States of the United States) actually paid into the Treasury of the Virgin Islands; and

"(ii) one hundred percent (100%) of the import duties and other taxes on raw material brought into the Virgin Islands for consumption or processing at the Plant and Related Facilities, and on building materials, furnishings and equipment imported into the Virgin Islands for use in the construction and expansion of the Plant and Related Facilities, actually paid into the Treasury of the Virgin Islands in respect of a period of sixteen (16) years from the Approval Date; and

"(iii) the entire amount of any taxes actually paid into the Treasury of the Virgin Islands that are attributable to or are imposed directly or indirectly as a result of one or more of (1) the subsidy and other payments, conveyances of property, and/or other actions by the Government in compliance with this Section (including this subdivision (iii) hereof) or any of the other provisions of this Agreement, (2) any sale, conveyance, exchange or transfer at any time within the period of sixteen (16) years from the Approval Date of all or any portion of, or interest in, the Government Properties and/or properties then comprising the Site, between Harvey, its Affiliates, or any two or more of them, or (3) any sale, conveyance, exchange or transfer at any time within the period of sixteen (16) years from the Approval Date of all or any portion of, or interest in, the Government Properties

Government taxes other than income taxes;" and (4) to maintain the channel and its turnabout area free from obstructions and dredged to their completed dimensions:

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and/or properties then comprising the Site, by Harvey, its Affiliates or any of them to or with one or more other persons, firms or corporations for the purpose of acquiring real property (or interests pertaining thereto) in the Virgin Islands to be included in the Site or for the purpose of acquiring cash or property which, within three years of such acquisition, is used for said purpose.

"During the period of sixteen (16) years from the date of completion of construction of the Plant, any stockholders of any such corporations who are residents of the Virgin Islands shall receive a non-taxable subsidy in an amount equal to seventy-five percent (75%) of the income taxes actually paid by them into the Treasury of the Virgin Islands on income derived by them as stockholders from activities in respect of the Plant and Related Facilities to which the foregoing exemptions and subsidies relate.

* * * * * * *

"* * * All transfers of real property (or interests pertaining thereto) to and from the Government pursuant to the terms of this Agreement, transfers of real property (or interests pertaining thereto) by and between Harvey and any one or more of its Affiliates, or by and between any two or more such Affiliates, and any transfers of real property (or interests pertaining thereto) contemplated by subdivision 9(B) (iii) and any other provision of this Agreement, shall be exempt from all taxation by the Government."

In Paragraph 4 of Annex C to the Agreement there were these further tax exemptions and subsidy provisions:

"(A) Harvey and its Affiliates shall have the right to use the above-mentioned channel and turnabout area free of any taxes, excises, duties, fees, charges, imposts, or exactions imposed by or with the consent of the Government or any subdivision, agency or instrumentality thereof, for a period of sixteen (16) years from the date of first commercial use thereof, which shall be deemed for purposes hereof to be the first anniversary of the Commencement Date; provided that Harvey and its Affiliates shall not thereafter be subject to any such taxes, excises, duties, fees, charges, imposts or exactions except as a part of a general law applicable to the use of navigational facilities subject to the jurisdiction of the Government."

7. The provisions as to reimbursement appear in Paragraph 4 of Annex C:

"(A) * * * Subject to the terms and conditions set forth herein, the Government agrees to reimburse Harvey for the costs of the

The Agreement prefaced its covenanting provisions with this statement of policy:

> "WHEREAS, it is the policy of the Government to alleviate under-employment in the Virgin Islands, to improve the quality of employment through the

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Channel Project, directly or indirectly incurred by Harvey on behalf of the Government for the dredging and completion of the channel and turnabout area, including in the computation of such costs a reasonable allocation of overhead and other indirect costs, all as determined in accordance with good accounting practices. The Government's undertaking herein to make reimbursement to Harvey as aforesaid shall in no event be considered to be a general obligation of the Government and shall not bear interest. Such reimbursement to Harvey shall not exceed $3,000,000 in the aggregate if either the Channel Project was constructed according to the design submitted by Harvey or Harvey failed to submit a design within eighteen (18) months after the Approval Date.

"(B) Within thirty (30) days after the end of Harvey's fiscal year, Harvey's Chief Financial Officer shall certify in reasonable detail to the Government the aggregate amount reimbursable but unreimbursed to Harvey hereunder, as at the end of such fiscal year, in respect of Channel Project costs incurred in that and any preceding fiscal year, and within thirty (30) days after the commencement of the Government's next succeeding fiscal year, the Government shall reimburse to Harvey the lesser of such amount and $500,000.

"(C) The Government agrees to use its best efforts to obligate to the extent that it may lawfully do so, for the purpose of making and to the extent necessary to make the reimbursement referred to above, all monies transferred and to be transferred to the Government pursuant to Section 7652 of the United States Internal Revenue Code of 1954, as amended, and the separate fund in which such monies are to be deposited pursuant to said Section. If and to the extent such monies and fund be insufficient for such purpose in any fiscal year, the Government undertakes, to the extent that it may lawfully do so, to obligate for the purpose of making and to the extent necessary to make such reimbursement, all other unobligated non-tax revenues of the Government. If and to the extent that said monies, fund and revenues be insufficient for such purpose

offering of employment involving higher skills, to have established in the Virgin Islands self-sustaining business enterprises and to encourage the investment of capital in the Virgin Islands, all to the end that the economy of the Virgin Islands may rest on a broader base; and

"WHEREAS, Harvey and Harvey Aluminum desire to acquire and operate processing and other facilities for the production of alumina and related products in the Caribbean area which Harvey anticipates will require the expenditure of $25,000,000, more or less, and (as reflected in the project information previously submitted by Harvey to the Government and referred to below) provide employment to approximately 400 persons; and

"WHEREAS, Harvey and Harvey Aluminum are willing to locate such facilities in the Virgin Islands, but only at the request and with the authorization of the Government and in accordance with other terms and provisions, all as set forth below; and

"WHEREAS, the Government considers that such facilities, if established, would promote the public

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in any fiscal year, the Government agrees that for the purpose of making and to the extent necessary to make such reimbursement (i) Harvey and its Affiliates may offset any amount reimbursable to Harvey then remaining unreimbursed against any amount other than income taxes that Harvey and its Affiliates may then have the obligation to pay over to the Government or its designee or designees, and (ii) the subsidy payable to Harvey and its Affiliates in respect of that and succeeding taxable years pursuant to Section 5(B) (i) of the foregoing Agreement shall be increased from seventy-five percent (75%) to one hundred percent (100%) of the income taxes (other than in respect of income derived from sources within any of the States of the United States) actually paid into the Treasury of the Virgin Islands."

interest by assisting in the economic development of the Virgin Islands; and

"WHEREAS, the Government after due investigation and consideration has determined that the construction and operation of such facilities would not be prejudicial to the health or welfare of the inhabitants of the Virgin Islands or to local property owners; and

"WHEREAS, as an inducement to Harvey and Harvey Aluminum to locate such facilities in the Virgin Islands, the Government is prepared to provide certain properties and a deep-water access channel in the vicinity of the Krause Lagoon area of St. Croix where it is presently contemplated that such facilities will be located, to grant certain tax exemptions and subsidies, and to comply with the other terms and provisions set forth below in order to authorize, facilitate and promote the establishment and operation of such facilities in the Virgin Islands;

"NOW, THEREFORE, the parties hereto mutually covenant and agree as follows:"

The Act 814 which adopted and ratified the Agreement and authorized the Governor of the Virgin Islands to carry out its provisions, it was stated:

"To Ratify and Adopt a Certain Agreement of February 8, 1962, Relating to an Alumina Plant Development in the Island of St. Croix and for Other Purposes.

"Be it enacted by the Legislature of the Virgin Islands:

"Section 1. The Legislature of the Virgin Islands hereby finds and declares:

"(1) that it is essential to the stability of the Virgin Islands economy that dependence on tourism be relieved through the establishment of industrial operations capable of providing and sustaining large scale employment and of contributing significantly toward a wider base for insular economic well-being;

"(2) that there is an existing and urgent necessity for the creation of additional water and power facilities as contemplated by the agreement referred to in the following paragraph the surpluses of which could be made available for the use of the inhabitants of St. Croix, and of business, industry and government;

"(3) that the development of an alumina plant and its related facilities as provided for in a certain agreement entered into on February 8, 1962, between the Government of the Virgin Islands and Harvey Alumina Virgin Islands, Inc., will promote the public interest by economic development of the Virgin Islands, and is vital to the prosperity of the entire region;

"(4) that the construction and development by the Government of the Virgin Islands of an access channel, and of public pier, docking and warehous-

ing facilities (which construction and development are hereby authorized) are essential public projects which will promote the public interest by economic development of the Virgin Islands; and

"(5) that the extraordinary advantages and benefits to the people of the Virgin Islands, to be directly derived from the undertakings proposed, fully warrant and require the cooperation, encouragement and assistance of the Government."

In their petitions seeking a decree declaring the Agreement and Act 814 invalid the appellants alleged that there was "neither public need nor purpose" for conveying public lands to Harvey "without consideration", or reimbursing it for $3,000,000 of its cost in developing the deep water channel and its turnabout area or granting it tax exemptions and subsidies; further, that as taxpayers, appellants had "a substantial pecuniary interest" with respect to the public lands and reimbursement undertaking, tax exemptions and subsidies, and accordingly had standing to bring their actions.[8]

8. As the appellants put it in their briefs "the Smith suit challenged the right of the Government to expend public moneys to reimburse Harvey the cost of constructing and dredging a channel and turning basin to provide access to its plant and in maintaining the channel", and "the Neumann suit challenges the Government's right to give 1200 acres of public land to Harvey as an inducement to install and operate an alumina plant on St. Croix." Smith, in his petition averred that he has "a substantial pecuniary interest in any sums, revenues and funds of federal and territorial public monies that may unlawfully be obligated and expended by the Government of the Virgin Islands;" further, that "the obligations undertaken by Respondent [Government] for the expenditure of $3,000,000 or more of federal matching funds on a Channel Project

Opinion

Government and Harvey each filed a "Motion to Dismiss and For Summary Judgment" with respect to the appellants' separate petitions, premising the request for dismissal "on the ground of failure to state a claim upon which relief can be granted", and that for summary judgment on the ground "that there is no genuine issue as to any material fact" and that the movant "is entitled to judgment as a matter of law."

On the score of the alleged "failure to state a claim upon which relief can be granted" the motions to dismiss stated:

> "1.(c) As appears from the petition, the Act and the Agreement *and the affidavits attached as Exhibits 1-8*, no tax funds to which Petitioners contributed were used to purchase said lands or will be used to effect any of the other matters complained of. (Emphasis supplied.)
>
> "(d) Petitioners cannot show that their taxes will be increased as a direct and immediate consequence of any of the matters complained of.

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which was primarily for the benefit of a private concern and for which there was neither public need nor purpose," as well as Government's granting to Harvey of tax exemptions and industrial subsidies "amounts to a deprivation of property of the taxpayers of the Virgin Islands without due process of law and an infringement of the protections provided to the taxpayers and citizens of the Virgin Islands in the Revised Organic Act of the Virgin Islands." Neumann in his petition made similar averments as to his "substantial pecuniary interest in the conservation and proper disposal of all assets of the Government of the Virgin Islands," and alleged "that the conveyance of public lands" to Harvey as provided by the Agreement and Act 814 "is not for a public purpose but instead is designed to render special financial assistance to a privately owned corporation * * * without adequate consideration."

"(c) Petitioners, thus, have no interest as taxpayers which will allow them to maintain this suit, and accordingly, there is no justiciable controversy and the petition fails to state a claim upon which relief can be granted."

The District Court in a brief Order granted the motions to dismiss the petitions under Rule 12(b) (6) F.R.Civ.P. for "failure to state a claim upon which relief can be granted." It did not rule with respect to the summary judgment phase of the motions.

While the District Court did not in its Order state the reason or reasons for its determination that the petitions failed "to state a claim upon which relief can be granted", implicit in its references to cases cited in that Order is its conclusion—not stated in terms—that the appellants had failed to allege that they had sustained, or were in immediate danger of sustaining, some direct injury as the result of the carrying out of the Agreement, or that they had a real interest beyond a desire to see that the laws of the Virgin Islands are enforced.

The parties to these appeals have seen fit to expend their talented energies and indefatigable efforts in presenting their respective arguments with respect to what may be designated as the "substantive" merits of the controversy as to whether the District Court erred in dismissing the petitions for failure to state a claim upon which relief can be granted.

[1] The arguments are academic to the issue presented by these appeals as to whether the District Court erred in dismissing the petitions in view of the fact that it was

procedurally precluded from doing so under the clear and dispositive provisions of Rule 12(b) and (c) of the Rules.

Rule 12(b) states:

> "* * * If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, *matters outside the pleading are presented to and not excluded by the court*, the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56 * * *." (Emphasis supplied.)

Rule 12(c) states:

> "(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." (Emphasis supplied.)

In the instant cases the Motions to Dismiss in paragraph 1(C) earlier set forth, were premised on what appeared "in the petitions, the Act and the Agreement *and the affidavits attached as Exhibits 1-8*", which had been "presented to and not excluded by the Court", and according to the mandate of Rule 12(b) and (c), the District

Court could not dismiss the petitions but was compelled to proceed under Rule 56, the summary judgment rule. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 357 n. 4, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959); *Gager* v. *Bob Seidel*, 112 U.S. App.D.C. 135, 300 F.2d 727, 731 (1962), cert. den. 370 U.S. 959, 82 S.Ct. 1612, 8 L.Ed2d 825; *Ellis* v. *Carter*, 291 F.2d 270, 275 (9 Cir. 1961).

[2] Since the record made below fairly presents the issue as to whether Government and Harvey are entitled to summary judgments judicial economy will patently be served by an immediate determination of this issue rather than remanding these cases to the District Court for disposition. *Romero* v. *International Terminal Operating Co., supra.*

As earlier stated, the appellants premised their petitions seeking a decree declaring the Agreement and Act 814 invalid on the grounds that it lacked "adequate" consideration and there was "neither public need nor purpose" (1) for the Government's conveyance of public lands to Harvey as site for its alumina plant and deep-water channel project; (2) reimbursement by Government of $3,000,000 of Harvey's cost in developing the channel; and (3) the Government's granting of tax exemptions and subsidies to Harvey.

While neither Government nor Harvey asserted in terms in their individual motions to dismiss and for summary judgment that the Agreement and Act 814 were designed to effectuate the public purpose they, however, filed in support of their motions an affidavit of Lawrence A. Harvey, president of Harvey, certifying that the alumina project would entail an expenditure of $25,000,000; that construc-

tion had been commenced; and that $1,000,000 had been expended "on the design and construction of the alumina plant"; and additional affidavits that Harvey had supplied to Government the $6,400 to acquire the Krause Lagoon acreage; that prior to such acquisition Government had not levied any taxes against the Krause Lagoon acreage since 1936; that the revenues derived by Government from Airport Land "at no time has been more than $1,760.00 per year"; and that Harvey had covenanted to pay into the Airport Fund of the Virgin Islands $2,500.00 for a period of sixteen years commencing December 31, 1962 in consideration of the conveyance to it of Airport Land.

Government and Harvey also filed as an Exhibit an "Address of Governor Ralph M. Paiewonsky [of the Virgin Islands], made a part of the Legislative record of the subject Act No. 814" * * *" in which he stated that salt water conversion and power plants to be constructed and operated by Harvey in connection with its project would make available for public consumption surpluses of water and power, and that the alumina development would "upgrade" the economy of the Virgin Islands. Further, at a hearing held by the District Court on the dismissal and summary judgment motions both Government and Harvey cited in support of the public purpose design of the Agreement and Act the declarations of such purpose contained therein, and the finding of the Legislature, expressed in the Act, that the Harvey development would make available "public pier, docking and warehousing facilities" which "will promote the public interest by economic development of the Virgin Islands."

Prior to the hearing on the dismissal and summary judgment motions the appellants filed affidavits expressing

"expert" opinions that (1) 100 to 300 acres would be ample to provide a site for the alumina plant and that 1200 acres "was excessive"; (2) there was no condition of unemployment in St. Croix; (3) Krause Lagoon had a great value to the Virgin Islands as a wildlife refuge, breeding ground and area for game fishing; and (4) the 500-acre Krause Lagoon (for which $6,100 had been paid) had an appraised value of from $125,000 to $350,000, and the 700-acre Airport Land an appraised value of from $625,000 to $969,250.

It must immediately be noted on the score of these appraisals that appellants have not adverted to them here, either in the several briefs which they have filed or at oral argument, and have merely stated without specification, in their petitions and briefs, that there was not "adequate consideration" for the conveyance of the public lands.

Again, as earlier stated, the appellants have premised their petitions on their view that "there was neither public need nor purpose" for conveying public land to Harvey, granting it tax exemptions and subsidies and reimbursement of $3,000,000 of its cost in developing the deep-water channel and turnabout area and that accordingly, Act 814 and the Agreement which it adopted and ratified were invalid.

Appellants do not dispute that if there was "public need or purpose" in the enactment of Act 814, and the Agreement and its undertakings, they have not made out a case. They vigorously contend, however, that the record affirmatively establishes absence of "public need or purpose", and alternatively, it at least presents genuine issues as to material facts with respect to the existence of "public

need or purpose" which preclude entry of summary judgment against them.

Applicable to these contentions are these well-settled principles:

[3, 4] "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation"; "• • • courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws"; and "Legislative bodies have broad scope to experiment with economic problems". "They may *'legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.'*"[10] (Emphasis supplied.)

[5, 6] "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive"; further, "The role of the judiciary" in determining whether the legislative power is being exercised for a public purpose "is an extremely narrow one" and once the public purpose has been established the means of its effectuation are for the legislative body—and it alone—to determine.[11]

[7] Courts "do not sit as a super-legislature to weigh the wisdom of legislation", and they *"leave debatable issues as respects business, economic, and social affairs to legislative decision."*[12] (Emphasis supplied.)

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9. Ferguson v. Skrupa, 372 U.S. 726, 729, 730, 83 S.Ct. 1028, 1030, 1031, 10 L.Ed.2d 93 (1963).

10. Barbier v. Connolly, 113 U.S. 27, 31, 5 S.Ct. 357, 359, 28 L.Ed. 923 (1885).

11. Berman v. Parker, 348 U.S. 26, 32, 33, 75 S.Ct. 102, 99 L.Ed. 27 (1954).

12. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423, 425, 72 S.Ct. 405, 407, 408, 96 L.Ed. 469 (1952).

[8] "The public welfare is a broad and inclusive concept. The moral, social, *economic, and physical well-being of the community* is one part of it; the political well-being, another."[13] (Emphasis supplied.)

[9] "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it."[14]

[10] Whether legislation serves a public purpose "is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court."[15]

[11] Applying the principles stated we are of the opinion that the legislative record provides a rational basis for the enactment of Act 814 and that it would constitute judicial trespass on the legislative function to proceed further with this litigation.

[12] Courts may not serve as a forum for the debate of legislative decisions though they may be fairly debatable. It is settled law that a rational actual basis for particular legislation must be held to exist if the question of what the facts establish, is a fairly debatable one.

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13. Id. 342 U.S. at 424, 425, 72 S.Ct. at 408, 96 L.Ed. 469.

14. Nebbia v. New York, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940 (1934).

15. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 515, 57 S.Ct. 868, 875, 81 L.Ed. 1245 (1937).

Clark v. Paul Gray, Inc., 306 U.S. 583, 594, 59 S.Ct. 744, 83 L.Ed. 1001 (1939); United States v. Carolene Products Co., 304 U.S. 144, 154, 58 S.Ct. 778, 82 L.Ed. 1234 (1938).

The appellants contend that the critical issue as to whether the Act, the Agreement and its undertakings, are invalid, depends on resolution of what they term to be "genuine issues with respect to material facts", to wit: (1) were the land grants to Harvey for a public purpose and had it "been given large tracts of land exceeding its needs"; (2) were the tax exemptions and subsidies accorded Harvey, and reimbursement to it of $3,000,000 of its cost in developing the deep-water channel, justifiable as effectuating the public purpose; (3) was the deep-water channel "an essential public project"; and (4) had the Legislature "had adequate time to study the Agreement and to investigate its many ramifications?"

[13] It is immediately apparent that what the appellants identify as "genuine issues as to material facts" are nothing more and nothing less than the assertion of debatable issues concerning which they entertain one view and the Legislature another, and as to which the Legislature has the last word. As we said in United States v. Kissinger, 3 Cir., 250 F.2d 940, 942 (1958):

> "They [courts] do not have power to inquire into either the degree of the necessity for * * * legislation or its wisdom or effectiveness."

It may be observed, parenthetically, on the score of the appellants' debatable issue as to whether the Legislature "had adequate time to study the Agreement and to investigate its many ramifications" that some six months before

the Legislature enacted Act 814 on February 19, 1962, it authorized a special independent industrial development committee to study alumina plants on the Island of Jamaica, where they are a major industry; that on February 14, 1962, the Legislature, sitting as "A Committee of the Whole", held a well-attended public hearing on the proposed Act and Agreement at St. Croix at which its proponents and opponents, including among the latter, counsel for the appellants, vigorously expressed their views.

It might be said anent our earlier statement that the legislative record presents a rational basis for its enactment of Act 814 that we had in mind its specific findings and declarations that the $25,000,000 alumina plant and its related facilities, as well as the deep-water channel and supplementary public piers, docks and warehousing facilities would relieve the Virgin Islands of dependence on tourism; promote employment; "promote the public interest by economic development of the Virgin Islands"; and provide water and power facilities whose surplus would be available for public use; further, "that the extraordinary advantages and benefits to the people of the Virgin Islands, to be directly derived from the undertakings proposed, *fully warrant and require the cooperation, encouragement and assistance of the Government*". (Emphasis supplied.)

It may be noted in passing that the United States, acting through the Administrator of the Federal Aviation Agency, approved the conveyance of Government's restricted title to Airport Land to Harvey, after it con-

sidered the provisions of the Agreement; further, that the "Deed of Release" from the United States to the Virgin Islands, dated May 16, 1962, specifically noted that such Release was to enable Government to convey the land to Harvey as site for its alumina plant.

For the reasons stated the Order of the District Court dismissing the appellants' petitions will be vacated and the causes remanded with directions to the District Court to enter summary judgments against the appellants.

Order Entered by the District Court of the Virgin Islands, July 10, 1963

ORDER

The above captioned cases have been consolidated for the purpose of argument and determination of the Rule 12(b)—Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted, and the Rule 56(b)—Motion for Summary Judgment, filed therein by the defendants.

Though somewhat different forms of relief are sought, both cases are concerned with the highly controversial agreement between the Virgin Islands Government and Harvey Alumina Virgin Islands, Inc., which Legislative Act and Agreement contemplates that Harvey will construct an alumina plant and dredge a deepwater channel thereto on the Island of St. Croix. In exchange therefor the Virgin Islands Government has agreed among other

things to convey some twelve hundred acres to Harvey, grant tax exemptions and reimburse Harvey for its channel construction expenses.

The issues presented by these consolidated cases have weighed heavily on this Court because of their far-reaching import and concern to the Virgin Islands. However, for the following reasons the 12(b) Motion attacking the standing of the petitioners to bring these actions as taxpayers must be granted.

The petitioners have failed to distinguish themselves from the controlling cases of *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Doremus v. Board of Education*, 342 U.S. 429 (1952) and *Otten v. Government of the Virgin Islands*, 161 Fed. Supp. 210 (1958). Even though the petitioners pay local and or Federal taxes on income or property, they have not shown to the satisfaction of this Court how they can void the application of the principles as pronounced in the above cited taxpayer suits to the effect that:

> "The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary, the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other, and neither may control, direct, or restrain the action of the other. We are not now speaking of the merely ministerial

duties of officials. . . We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal

department,—an authority which plainly we do not possess." *Massachusetts* v. *Mellon*, *supra*, Page 488-489.

". . . because our own jurisdiction is cast in terms of 'case of controversy', we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without reviewing any procedure which does not constitute such. The taxpayer's action can meet this test, but only when it is 'a good-faith pocketbook action'". *Doremus* v. *Board of Education*, *supra*, Page 434.

". . . one essential and fundamental requisite to maintaining a taxpayer's suit, or for that matter, the invocation of equitable relief generally, is that the plaintiff have a real interest in the case beyond his subjective desire to see that the law is properly enforced." *Ottley* v. *Government of the Virgin Islands*, *supra*, Page 211.

Such holdings most certainly appear to be dispositive of petitioners' taxpayer cases as presented. However, even if it did not so appear to this Court the petitioners could not expect to fare any better upon a ruling in regard to the Rule 56(b)—Motion for Summary Judgment—in light of the recent Supreme Court case of *Ferguson* v. *Skrupa*, decided April 22, 1963, appeal from U. S. District Court for the District of Kansas, No. 111 October Term, 1962, Advance Sheet, unanimous decision with opinion delivered by Justice Black.

The Ferguson case was before the Supreme Court to review the judgment of a three judge District Court

Order Entered by the District Court of the Virgin Islands, July 10, 1963

enjoining, as being in violation of the Due Process Clause of the Fourteenth Amendment a Kansas statute making it a misdemeanor for any person to engage "in the business of debt adjusting" except as an incident to the lawful practice of law in that state. The Supreme Court refused to "sit as a superlegislature to weigh the wisdom of legislation" and they emphatically refused "to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

They also stated that "The criterion of constitutionality is not whether we believe the law to be for the public good." And further stated that "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

Certainly, the Virgin Islands Legislature's negotiations and agreement with Harvey are in regard to and are designed to affect economic conditions in the Virgin Islands, and this Court would, therefore, in light of these recent Supreme Court pronouncements, have no choice but to grant the defendants' Motion for Summary Judgment.

In light of the above conclusions, the Government's and Harvey's 12(b)—Motion to Dismiss for Failure to State a Claim upon Which Relief can be Granted is hereby granted, with costs and reasonable attorneys' fees.

/s/ Walter A. Gordon

Judge of the District Court

By the Court.

Dated: July 10, 1963

Section 3. Revised Organic Act of the Virgin Islands

68 Stat. 498, amended, 72 Stat. 1094.
Title 48 USC 1561

No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein equal protection of the laws.

In all criminal prosecutions the accused shall enjoy the right to be represented by counsel for his defense to be informed of the nature and cause of the accusation, to have a speedy and public trial, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor.

No person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal cause to give evidence against himself; nor shall any person sit as judge or magistrate in any case in which he has been engaged as attorney or prosecutor.

All persons shall be bailable by sufficient sureties in the case of criminal offenses, except for first-degree murder or any capital offense when the proof is evident or the presumption great.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

No law impairing the obligation of contracts shall be enacted.

No person shall be imprisoned or shall suffer forced labor for debt.

Section 3. Revised Organic Act of the Virgin Islands.

All persons shall have the privilege of the writ of habeas corpus and the same shall not be suspended except as herein expressly provided.

No ex post facto law or bill of attainder shall be enacted.

Private property shall not be taken for public use except upon payment of just compensation ascertained in the manner provided by law.

The right to be secure against unreasonable searches and seizures shall not be violated.

No warrant for arrest or search shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Slavery shall not exist in the Virgin Islands.

Involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted by a court of law, shall not exist in the Virgin Islands.

No law shall be passed abridging the freedom of speech or of the press or the right of the people peaceably to assemble and petition the government for the redress of grievances.

No law shall be made respecting an establishment of religion or prohibiting the free exercise thereof.

No person who advocates, or who aids or belongs to any party, organization, or association which advocates, the overthrow by force or violence of the government of the Virgin Islands or of the United States shall be qualified to hold any office of trust or profit under the government of the Virgin Islands.

Section 3. Revised Organic Act of the Virgin Islands

No money shall be paid out of the Virgin Islands treasury except in accordance with an Act of Congress or money bill of the legislature and on warrant drawn by the proper officer.

The contracting of polygamous or plural marriages is prohibited.

The employment of children under the age of sixteen years in any occupation injurious to health or morals or hazardous to life or limb is prohibitive.

Nothing contained in this chapter, sections 104 and 111 of Title 21, and section 3350(g) of Title 26 shall be construed to limit the power of the legislature herein provided to enact laws for the protection of life, the public health, or the public safety.

No political or religious test other than an oath to support the Constitution and the laws of the United States applicable to the Virgin Islands, and the laws of the Virgin Islands, shall be required as a qualification to any office or public trust under the Government of the Virgin Islands. July 22, 1954, c. 558, § 3, 68 Stat. 498, amended Aug. 28, 1958, Pub. L. 85-851, § 1, 72 Stat. 1094.

General Territorial Provisions Local or Special Laws

24 Stat. 170, Title 48 U.S.C. 1471

The legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say:

Granting divorces.

Changing the names of persons or places.

Laying out, opening, altering, and working roads or highways.

Vacating roads, town plats, streets, alleys, and public grounds.

Locating or changing county seats.

Regulating county and township affairs.

Regulating the practice in courts of justice.

Regulating the jurisdiction and duties of justices of the peace, police magistrates, and constables.

Providing for changes of venue in civil and criminal cases.

Incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village.

For the punishment of crimes or misdemeanors.

For the assessment and collection of taxes for Territorial, county, township, or road purposes.

Summoning and impaneling grand or petit jurors.

Providing for the management of common schools.

Regulating the rate of interest on money.

The opening and conducting of any election or designating the place of voting.

The sale or mortgage of real estate belonging to minors or others under disability.

The protection of game or fish.

Chartering or licensing ferries or toll bridges.

Remitting fines, penalties, or forfeitures.

Creating, increasing, or decreasing fees, percentage, or allowances of public officers during the term for which said officers are elected or appointed.

Changing the law of descent.

Granting to any corporation, association, or individual the right to lay down railroad tracks, or amending existing charters for such purpose.

Granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever.

In all other cases where a general law can be made applicable, no special law shall be enacted in any of the territories of the United States by the Territorial legislatures thereof. July 30, 1886, c. 818, §1, 24 Stat. 170.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1113

NORMAND SMITH and NANCY L. SMITH, and HARRY NEUMANN,

Petitioners,

v.

GOVERNMENT OF THE VIRGIN ISLANDS, HARVEY ALUMINUM (INCORPORATED), and HARVEY ALUMINA, VIRGIN ISLANDS, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Decisions of the Courts Below

The subject legislation (Act 814) concerns solely the economic needs of the undeveloped insular economy of the Virgin Islands and the economic projects designed as a step forward to meet those needs.

By their complaints in their taxpayer actions, petitioners asked that that legislation be declared invalid solely under the due process and equal protection clauses in the Revised Organic Act for the Virgin Islands.*

Respondents made two motions in the District Court, namely (1) under Rule 12(b) to dismiss the

* 48 U. S. C. § 1561.

actions on the ground that petitioners had no standing to maintain their alleged taxpayer actions and (2) under Rule 56(b) for summary judgment that the subject legislation was valid.

By its decision the District Court granted respondents' motion under Rule 12(b) and further found that if petitioners had had a standing to sue, the court would, then, have had no choice but to grant respondents' motion for summary judgment.

By its decision, the Court of Appeals found that the continuance of this litigation would constitute a judicial trespass on the legislative function and held that respondents were entitled to summary judgment on the merits.

Petitioners' petition for a rehearing was denied by the Court of Appeals, 7 judges present.

Questions Presented

1. Are the "questions presented" by petitioners anything more than rhetorical questions, divorced from the terms and circumstances of the case?

2. Is there any reason for a review by this Court of the decision of the Court of Appeals that there is no basis, on the facts in this case, for the judiciary to reject the findings of the Legislature of the Virgin Islands, i.e.:

> (a) that the Islands have an undeveloped economy which needed to be relieved from dependence on tourism and required a higher quality of employment;
>
> (b) that it is in the public interest to develop that economy by promoting the establishment of large scale industrial operations and related facil-

ities, including public facilities for handling ocean-going commerce;

(c) that it is vital to the prosperity of the entire region to start the promotion of such economic goals through the specific means (i.e. the Agreement with Harvey) adopted in the subject legislation; or

(d) in short, that the subject legislation is for the public purpose of improving the economic welfare of the people of the Virgin Islands?

3. Do petitioner-taxpayers have, as regards an action to challenge the validity of the subject legislation, the required interest to create the justiciable case or controversy necessary to invoke the jurisdiction of this Court?

Statement

Petitioners' selected version of the facts does not contain the facts material to the consideration of the questions presented.

The Virgin Islands is an undeveloped economic area which is, insular, both geographically and in the sense of being out of the stream of our national economic life. Its economy is dependent on tourism (A22a; RA20b)*. The median income of families and unrelated individuals is only about $1,600; and more than 25% of them have an annual income of less than $700 (RA25b). The median school years completed is not over 7.5 years (RA26b). The federal government designated the Virgin Islands as a redevelopment area (26 Fed. Reg. 9939, Oct. 1961).

*These and similar references are to petitioners' Appendix ("A"), and to respondents' Appendix ("RA"), in the court below which have been filed with this Court.

The Legislature made determinations and findings of fact as to what were the essential needs of the economy. It did so in the subject Act itself (A22a-23a). It did so when it ratified and adopted the governmental findings contained in the Agreement with Harvey (A25a-27a). In addition, a part of the legislative record consisted of the findings made by the government as a result of its studies and investigations (RA18b-23b).

Those legislative determinations and findings were, in brief, that it was essential to the general economic welfare that dependence on tourism be relieved through the establishment of large scale industrial operations and related facilities including public facilities for handling oceangoing commerce.

So the subject legislation was for an obvious public purpose, i.e., to advance the general economic welfare of an undeveloped economy.

The means the Legislature adopted as a first step in effectuating that public purpose was the Agreement with Harvey (A25a-59a). By it the Legislature sought basically to induce Harvey:

> (1) to establish at an anticipated cost of $25,000,000 an alumina plant with related facilities including its own water supply facilities and thereafter to go forward with contemplated future industrial expansions; and
>
> (2) to create a public deep water channel with a turn-about area providing access not only to the alumina plant but also to public land for the establishment of a public pier and related public facilities to handle oceangoing commerce for the public.

These actions were instituted after Harvey had designed, with the approval of the government, the public

deep water channel and after Harvey had spent more than $1,000,000 going forward with the other economic projects authorized by the subject legislation (RA17b-18b).

To induce Harvey to assume the risks of going to the Virgin Islands and pioneering in these industrial and commercial developments, the Legislature found that it was necessary to provide some incentives (RA 26a, third "Whereas" clause). States all over our country are competing with one another offering incentives to encourage the establishment of industrial operations within their respective areas (RA27b-31b). The facilities and advantages which such states have to attract the location of industrial establishments are obviously not found in such an undeveloped insular economy as the Virgin Islands.

Petitioners characterize the inducements which the Legislature offered Harvey as nothing but "gratuitous grants" of "treasure" owned by the Virgin Islands. But this is what the Legislature approved:

First, it was agreed to convey to Harvey such interest as the Virgin Islands had in about 700 acres of land, subject, however, to the approval of the federal government. For that land had been acquired by the federal government; and under federal law its disposition and use was subject to federal determination. (RA15b; RA2b-5b)

Such restricted title as the Virgin Islands acquired from the federal government did not cost the Virgin Islands or its taxpayers one cent. That land had never produced any revenue for the Virgin Islands—during the 14 years it held such restricted title—in excess of $1,730 in any year. And, in connection with obtaining

the approval of the federal government, Harvey agreed to pay to the Virgin Islands $2,500 annually for 16 years. (RA15b; RA14b)

Second, it was agreed to convey to Harvey a 500 acre salt water marshland (the Lagoon). This marshland was the only place through which the public deep water channel and related public facilities could be developed (A53a, 55a).

Here again this marshland did not cost the Virgin Islands or its taxpayers one cent. It had never contributed any revenue for the Virgin Islands. The government obtained title to the Lagoon from a private person with $6,100 supplied by Harvey. So Harvey actually purchased this Lagoon with its own money. (RA14b; RA16b)

Third, it was agreed to give Harvey certain rights to obtain reimbursement for the cost of developing the public deep water channel and turn-about area. But the government did not assume any general obligation therefor. It merely agreed to use its best efforts to obligate the federal so-called matching funds (payable to the Virgin Islands by the federal government) to make such reimbursement. (A57a-58a)

But the use of such funds by the Virgin Islands (for such or any other purpose) is by federal law subject to the approval of the federal government, i.e., the President of the United States or his designee.*

So Harvey was given the right if such approval should not be given to obtain such reimbursement by way of tax exemptions, as regards the taxable revenue produced by its business operations in the Virgin Islands (A58a). In other words, Harvey's right to get such reimbursement is a self-liquidating one.

* Section 7652(b) of the Internal Revenue Code of 1954.

And thus Harvey was required to assume the risk of getting no reimbursement even for the development of these public facilities.

Fourth, it was agreed to give Harvey during a period of 16 years certain tax exemptions; but these exemptions do not apply to 25% of the applicable income tax (A38a-41a). Those exemptions do not eliminate any revenue previously received by the government, since the government has not been receiving any tax revenue at all from the sources to which the exemptions are applicable.

Similar exemptions are made available in the subject legislation for those who establish comparable industrial operations in the Virgin Islands (A25a).

THE REASONS WHY THE PETITION SHOULD BE DENIED

(1)

None of the "questions presented" by petitioners amount to anything more than rhetorical questions, divorced from the terms and circumstances of the case which involves the particular needs of the undeveloped insular economy of the Virgin Islands.

Those "questions" amount to nothing more than whether a gift of public money for a private purpose is invalid or whether a private purpose is a public purpose or whether the gratuitous grant of a special privilege for a private purpose is invalid. Such questions are straw-men questions which answer themselves.

The "reasons" petitioners enumerate for granting the writ constitute, on their face, no reason at all for a review of the questions the present.

For example, they offer their opinion that the decision of the Court of Appeals is of grave concern to the people of the Virgin Islands. But these three peti-

tioners—two of whom pay federal income taxes in Connecticut (A1a)—do not speak for the people of the Virgin Islands. Those people are represented by their legislators; and the subject legislation was enacted without one dissenting vote. Perhaps some persons would like the Virgin Islands to be kept as an exclusive preserve for winter vacationers, having a supply of cheap-wage domestic servants.

Again, petitioners assert that the procedural aspects of this case, e.g., the granting of summary judgment, have been objectionable. But this matter of procedure is not even one of the questions petitioners present for review. Moreover, petitioners' representations that they have not had their full day in court are demonstrably false as shown by the indisputable facts as to what has taken place in these proceedings from the beginning, including their own briefs submitted to the District Court and to the Court of Appeals.*

(2)

There is no reason at all for a review of the decision of the Court of Appeals.

After reviewing the entire record, including the legislative findings as to the particular needs of the undeveloped insular economy of the Virgin Islands, the Court of Appeals stated the essence of its holding when it found that "It would constitute a judicial trespass on the legislative function to proceed further with this litigation."

We believe it is elementary by now that the judiciary is being asked to commit a trespass upon the legislative function when it is asked to reject the deter-

* See respondents' "Answer in Opposition To Petition For Rehearing", which was reviewed by the Court of Appeals, having before it the full record of all the proceedings, including the briefs in the District Court.

minations and judgment of the legislature as to the needs of an undeveloped economy, as to the economic projects to meet those needs and as to the quantum of governmental assistance required to achieve those economic goals.*

Unless it is clearly established that there is no rational basis, at all, for such determinations and judgment, the matter is solely for the Legislature. And petitioners do not even present the question for review by this Court as to whether there is any rational basis at all for such determinations and judgment on the part of the Legislature of the Virgin Islands.

For, as found by the Court of Appeals, petitioners' claims amount to "nothing more and nothing less than the assertion of debatable issues concerning which they entertain one view and the Legislature another, and as to which the Legislature has the last word."

Petitioners seem to be suggesting that legislation —which otherwise clearly provides for a public purpose for the Virgin Islands—is converted, as a matter of law, into legislation for a private purpose for the benefit of a private corporation, merely because the achievement of that purpose involves the giving of some incentives by the Virgin Islands to private industry.

The basic principles which repudiate petitioners' position have been repeatedly laid down by this Court**

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* "With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire." *Green v. Frazier*, 253 U.S. 233, at 240 (1920).

** *Barbier v. Connolly*, 113 U.S. 27 (1885); *Nebbia v. New York*, 291 U.S. 502 (1934); *Berman v. Parker*, 348 U.S. 26 (1954); *Green v. Frazier*, 253 U.S. 233 (1920); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937); *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

and have become by now elementary. And those principles have been repeatedly applied in cases involving legislation which authorized financial assistance to private industry where there was far less need to improve an undeveloped economy through industrialization than has been found by the legislature to exist in the undeveloped insular economy of the Virgin Islands.*

Petitioners cite two cases decided by this Court more than 75 years ago.** There was no legislative finding as to the municipalities involved in those cases that the nature of their economies was such that the public interest required industrialization. Those cases involved nothing comparable to the legislative findings as to the needs of the undeveloped insular economy of the Virgin Islands.

So there is nothing to petitioners' claim that the subject legislation was not for a public purpose; and that is the sole basis for all their arguments—including their reference to the equal protection clause and to 24 Stat. 170.† As the Court of Appeals found: "Appellants do not dispute that if there was 'public need or purpose' in the enactment of Act 814, and the Agreements and undertakings, they have not made out a case."

That is why, when the Court of Appeals found that there was no basis for rejecting the legislative determi-

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* *Albritton* v. *City of Winona*, 181 Miss. 75, 178 So. 799, *appeal dismissed*, 303 U.S. 627 (1938); *Cannata* v. *City of New York*, 11 N.Y. 2d 210, 182 N.E. 2d 395, *appeal dismissed*, 371 U. S. 4 (1962); *City of Frostburg* v. *Jenkins*, 215 Md. 9, 136 A. 2d 852 (1957); *McConnell* v. *City of Lebanon*, 203 Tenn. 498, 314 S. W. 2d 12 (1958); *In re Opinion of the Justices*, 177 A. 2d 205 (Sup. Ct. Del. 1962).

** *Citizens Saving and Loan Association* v. *Topeka*, 20 Wall. 655 (1874); *Cole* v. *La Grange*, 113 U. S. 1 (1885).

† 48 U.S.C. § 1471.

nation with respect to the public purpose involved, it had no occasion to deal specifically with the provisions of 24 Stat. 170.

Petitioners seem to imply that the Legislature of the Virgin Islands could not move forward with its economic goal of industrial development unless it induced *simultaneously* the establishment in the Virgin Islands of large-scale industrial operations by some unnamed *number* of industrial corporations.

The subject legislation provided everything it reasonably could for additional comparable developments by authorizing the Government to extend similar benefits to induce the establishment of other comparable industries (A25a).

(3)

Moreover, petitioner taxpayers do not have the required interest to create a justiciable case or controversy necessary to invoke the jurisdiction of this Court.

In *Doremus* v. *Board of Education*, 342 U. S. 429 (1952) this Court dismissed an appeal of a taxpayer, seeking to have a statute of New Jersey declared invalid, on the ground that the taxpayer had failed to show the required justiciable controversy to invoke the jurisdiction of this Court, saying (p. 433):

> "Whether such facts amount to a justiciable case or controversy is decisive of our jurisdiction."

The relevant tests of whether a justiciable controversy exists in a taxpayer's action, such as we have here, were declared in *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923), reaffirmed in *Alabama Power Co.*

v. *Ickes*, 302 U. S. 464 (1938) and amplified and applied in *Doremus* v. *Board of Education, supra.*

The necessary justiciable controversy requires a showing by the taxpayer that he "'has sustained or is immediately in danger of sustaining some direct injury'." A taxpayer can meet the test only when he has "a good-faith pocketbook action". (*Doremus* v. *Board of Education, supra,* p. 434.)

Even if a taxpayer could show that he will suffer in some indefinite way in common with people generally, that is not enough. For in that area the matter is for the legislative branch and not for the judiciary. That is why the taxpayer must show financial injury which is direct and also particular in that it differentiates him from the community in general. (*Doremus* v. *Board of Education, supra,* pp. 434-435.)

These taxpayer actions are far removed from any "good-faith pocketbook action". Petitioners did not contribute so much as one cent to the Lagoon which is involved. The title to that property was paid for by Harvey itself.

Petitioners did not contribute so much as one cent to the land. It was acquired by the federal government without one cent of contribution from the Virgin Islands taxpayers. And the use and disposition of that land pursuant to the subject legislation was only possible, under federal law, by virtue of the determination and approval of the federal government.

Petitioners will not contribute so much as one cent to the federal so-called matching funds, which might be used in the future provided the federal government approves, as is required by federal law. Those funds

will all be acquired from the federal government without one cent of contribution from the Virgin Islands taxpayers.

Thus, although no claim has been made against the federal government, these taxpayer actions are directed in substance to the use and disposition of federal property.

To the extent petitioners do have an interest in the subject legislation, it is an interest in common with the community and people generally. The subject matter of the legislation concerns exclusively economic needs and economic projects designed for the promotion of the general welfare.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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